Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

COMMENTS OF US LEC CORP.

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TABLE OF CONTENTS

Page

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	)	
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US LEC Corp. ("US LEC") submits these comments in response to the above-captioned notice of proposed rulemaking examining the appropriate regulatory framework for broadband access to the Internet over wireline facilities.[1]

EXECUTIVE SUMMARY

In the *NPRM*, the Commission for the first time makes the extraordinary announcement that its "primary policy goal [is] to encourage the ubiquitous availability of broadband to all Americans."[2] Given this statement, US LEC is concerned that the Commission may, in pursuit of this policy goal, eliminate the key ILEC obligations that are instrumental to ensuring the very competition that has sparked many of the technological innovations and developments of the past

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1 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 02-42, released February 15, 2002 ("*NPRM*").

2 *NPRM* at ¶ 3.

six years, including the deployment of broadband services. In fact, the suggestion contained in the *NPRM* that some or all broadband transmission capability deployed by wireline common carriers would not be subject to Title II obligations or available to competitors, would, if adopted, ultimately hinder rather than promote the provision of broadband services to all Americans. In fact, deregulation of ILEC broadband capability would merely serve to enhance the ability of ILECs to thwart intramodal competition, as well as their ability to delay introduction of network improvements that they would otherwise be compelled to make in response to intramodal competition.

In order to promote its broadband goals, the Commission should reaffirm that ILECs' broadband capability is, and will be, subject to the procompetitive obligations of Title II and of the 1996 Act, as well as the *Computer Inquiry* obligations. The broadband competition that these regulatory requirements make possible will itself help meet the Commission's broadband goals and continue to encourage ILECs to deploy advanced broadband capability.

In this proceeding, the Commission should conclude that facilities-based wireline broadband Internet access service is a bundled offering of a telecommunications service (subject to Title II) and an information service. In large part, wireline broadband Internet access service provides to the customer no more than a transparent transmission path to third party content providers, similar to the way a voice network provides a pathway for end users to obtain various third party-provided audiotext information. In fact, end users would have it no other way. At the same time, wireline broadband Internet access service providers also use telecommunications services to provide an information service, such as access to email stored on the provider's server. Wireline broadband Internet access is not a seamless information service because the

transparent transmission path is functionally separate from information services and is perceived as such by end users.

The transmission component of wireline broadband Internet access services is already subject to Title II pursuant to the Commission's long-standing *Computer Inquiry* rules. Under these rules, ILECs may use their own DSL services to offer high speed Internet access services, but, pursuant to Title II, are required to make DSL services available to other ISPs on a nondiscriminatory basis.

All of the policy and public interest considerations underpinning common carrier designation require that this capability be subject to Title II and unbundling obligations. Under *NARUC I* and *II*, ILECs are making an offer to the public at large to provide telecommunications for a fee, thus triggering common carrier status for the transmission component of wireline broadband Internet access. The fact that ILECs continue to own and control the local loop -- the most fundamental bottleneck facility -- compels common carrier status under the Act and common law.

Not surprisingly, control of the local access network confers tremendous market power and market advantage on the ILECs, as evidenced by their 93% share of the wireline broadband Internet access market. This overwhelming market dominance also requires that Title II regulatory controls and safeguards be kept in place.

In explaining its options to "deregulate" broadband services, the Commission should not overlook the fact that Title II readily provides a means of deregulating broadband through use of the Commission's forbearance authority under Section 10. The use of Title II together with the forbearance authority allows the Commission to balance deregulation with the need to promote competition and protect the public interest, and is therefore the best alternative for achieving the

goal of a deregulatory framework for the provision of broadband services, if the Commission determines any deregulation is necessary. In sharp contrast to its experience under Title II, the Commission has no experience fashioning safeguards under Title I; moreover, the scope of the Commission's authority under Title I is ill-defined. The Commission may fashion a deregulatory framework for broadband while retaining Title II authority, rather than attempting to do so using the uncertain authority under Title I. Broadband development is too important to be jeopardized by the uncertainty created by the untested use of the Commission's Title I authority.

Another compelling public interest benefit of preserving the Title II obligations on wireline providers of broadband services is that it eliminates concerns that many providers of services would escape their universal service contribution obligation. Retaining Title II authority would help to assure the long term viability of universal service funding, which is applicable to entities that "provide" telecommunications or telecommunications service. Requiring ILECs to continue offering broadband capability as a telecommunications service would also preserve other important public interest benefits that are triggered by the provision of telecommunications service. These include, for example, CALEA, CPNI requirements, and access to telecommunications services by persons with disabilities.

There is nothing developed in proceedings to date to support the notion that elimination of Title II regulation of ILEC broadband capability is necessary to permit ILECs to compete intermodally. ILECs currently compete and provide broadband information services as customers of their own tariffed broadband telecommunications services. The record in the Commission's review of the regulatory requirements for incumbent broadband service demonstrates that ILECs, in fact, have been experiencing record breaking growth in DSL

subscribership since they determined to provide that technology in a competitive response to CLEC activities.

Finally, the Commission should retain and strengthen *Computer III* safeguards against discrimination. The *Computer III* regulatory framework has been the foundation for the growth and success of the Internet. The *NPRM* does not make a compelling case that marketplace conditions have changed sufficiently -- or at all -- to permit elimination of *Computer III* safeguards. The assertion that those safeguards were limited to the voice network is simply wrong. In *Computer III,* the Commission deliberately created a framework designed to deal with the changing nature of the network to a more advanced capability. *Computer III* safeguards are not limited to specific technologies. Instead, they are broad anti-discrimination requirements that can be, and are, equally applied in a narrowband or broadband environment. The requirement that ILECs provide Internet access as customers of their own tariffed services remains both appropriate and necessary for their provision of broadband wireline services.

The Commission should find that ILECs' broadband wireless services and facilities remain subject to Title II and *Computer Inquiry* safeguards.

INTRODUCTION

The Commission has consistently resolved issues concerning the statutory definitions of services – whether basic or enhanced, telecommunications or information -- in light of the given policy goals and objectives. For example, the Commission established its definitions of basic and enhanced services in order to assure that information services providers would not be unnecessarily regulated as common carriers while assuring that ILECs are not able to leverage control of the local network into control of the information services market as well.

This proceeding involves significant policy issues. If not carefully considered, some of the possible outcomes of this proceeding, such as sweeping deregulation of wireline broadband

Internet access, could have serious and damaging consequences for the Commission's stated policy objectives. One widely reported possible outcome is that ILEC broadband capability would be deregulated by defining it as an information service and removing it from Title II oversight. At the same time, the Commission might eliminate *Computer Inquiry* unbundling obligations and other safeguards against discrimination.

None of these deregulatory steps would promote broadband deployment, and in fact would actually thwart the Commission's policy goals and objectives by recreating a monopoly environment and removing any competitive or market incentives for the ILECs to make broadband available to all Americans. Reclassification of ILEC broadband capability as an information service to any significant extent could undermine the availability of Section 251(c)(3) unbundling for CLECs, because only ILEC facilities used to provide telecommunications service meet the definition of network elements subject to unbundling. This would effectively put the ILECs in complete and unassailable control of the wireline broadband infrastructure. The removal of safeguards against discrimination would permit ILECs to maintain and further extend their dominance in wireline broadband Internet access beyond the 93% of customers they already possess and effectively squeeze any remaining competition out of the market.

The reclassification of wireline broadband Internet access would also create collateral damage to other important public interests and policies. For example, the long-term viability of universal service programs would be threatened, because under the Act only providers of telecommunications or telecommunications service have a clear statutory obligation to contribute to universal service funding. Similarly, reclassification would undermine the effectiveness of the

CALEA program and consumer protection statutes such as discontinuance obligations, the consumer protections of CPNI rules, and access to services by persons with disabilities.

Therefore, a framework must be maintained in which ILEC broadband capability continues to be categorized as telecommunications service subject to the safeguards necessary under Title II to promote broadband competition and deployment and protect the public interest.

I. THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE IS, AND SHOULD REMAIN, SUBJECT TO TITLE II

A. Wireline Broadband Internet Access Is Comprised of Two Separate and Distinct Services: A Transparent Transmission Service And An Information Service

The provision of wireline broadband Internet access is, in most cases, the provision of a telecommunications service – namely, a transparent transmission path. As the Commission stated in the *NPRM*:

> [a]n entity provides 'telecommunications' (as opposed to merely using telecommunications) when it both provides a transparent transmission path and it does not change the form or content of the information.[3]

A provider of wireline broadband Internet access services does not change the form or content of the information received from or sent to the information content provider by the customer. Although both the customer and the content provider can alter the appearance or format of the information they receive, this is accomplished through the use of computer software after the information has been transmitted and is not controlled by the Internet access service provider. The broadband Internet access service provider is therefore providing a telecommunications service rather than an information service. This is analogous to the use of the traditional voice telephony network to retrieve information such as time and weather: the use

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[3] *NPRM* at ¶ 25.

of the voice network to retrieve this information does not turn the transmission service into an information service.

There are circumstances where a wireline provider uses a transmission path to provide information services. For example, an information service is being provided when the customer accesses stored information, such as e-mail, that has been stored by the wireline provider. However, this information service is a separable component from the provision of the transmission path. Therefore, wireline broadband Internet access is a bundled offering of a transmission service and an information service rather than a single information service.

The Commission has recognized that, in determining whether the offering is a single information service or a bundled offering of information service and telecommunications service for one price, the "issue is whether, functionally, the consumer is receiving two separate and distinct services."[4] The *NPRM* tentatively concludes that wireline broadband Internet access service is a single information service offering, but does not provide any explanation as to why it is not two "functionally separate and distinct services." Telecommunications is statutorily defined as functionally different than service features or enhancements that could constitute an information service, such as changes in the form and content of information. Therefore, when providers are providing no more than a pure transmission service, they are offering something that is functionally distinct from the information services provided when selected by the user.

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[4] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, FCC 97-420, ¶ 282 (Dec. 30, 1997)

Customer perception also supports the conclusion that the transmission and information services being provided are functionally distinct. When consumers use an Internet access service to access an Internet site, they expect that there will be no change in the form or content of the information provided by the content provider. Therefore, consumers clearly perceive the functional difference between the pure transmission service provided by the Internet access provider and the information service provided by the content provider, even though they may not be able to articulate this distinction in the appropriate regulatory terms. Accordingly, under the "functionally separate and distinct" test, wireline broadband Internet access is the provision of both a telecommunications service (*i.e.,* a pure transmission path) and an information service.

B. The Transmission Component of Wireline Broadband Internet Access Is Already Subject to Title II

The possibility suggested in the *NPRM* that the transmission component of wireline broadband Internet access service could be subject only to Title I ignores the fact that it is already subject to Title II. The Commission already has an appropriate framework for broadband wireline Internet access, under which ILECs offer broadband Internet access over their own facilities. *Computer II* rules adopted pursuant to the Commission's authority under Title II provides that,

> "carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."[5]

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[5] *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling and American Telephone and Telegraph Company Petition for Declaratory Ruling, Memorandum Opinion and Order*, 10 FCC Rcd. 13717, 13719 (1995) ("*Frame Relay Order*").

Thus, the Commission has already asserted Title II authority over the transmission component of wireline broadband Internet access, effectively refuting the proposition that the transmission component of wireline broadband Internet access is subject only to Title I.

C. The Telecommunications Component of Wireline Broadband Internet Access Is Subject to Title II Under *NARUC I* and *II*.

In addition to the fact that the transmission component of wireline broadband Internet access is already subject to Title II, the definition of common carriage also requires that it be subject to common carrier regulation.

A common carrier is defined in the Act as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . ."[6] and in the Commission's regulations as "a person engaged in rendering communications service for hire to the public."[7] The U.S. Court of Appeals for the D.C. Circuit fleshed out these definitions by establishing a test in *NARUC I* and *II* [8] for determining whether an activity constitutes communications common carriage.

The D.C. Circuit held that the "critical point" is the "quasi-public character of the activity involved," *i.e.*, "that the carrier undertakes to carry for all people indifferently."[9] It does not matter how large a clientele the carrier serves, but whether the carrier is "holding [it]self out to serve the public indiscriminately."[10] This may arise either through an obligation to serve the public indifferently or through reasons implicit in the nature of

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6 47 U.S.C. § 153(10).

7 47 C.F.R. § 51.5.

8 *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

9 *NARUC I* at 641.

10 *Id.* at 642.

the carrier's operations that result in an expectation of an indifferent holding out to the eligible public.[11] In contrast, private carriage is "set aside for the use of particular customers, so as to not be generally available to the public."[12] Private carriage is characterized by a "clientele that might remain relatively stable, with terminations and new clients, the exception rather than the rule."[13] In private carriage, the carrier would negotiate with and select clients on an individualized basis.[14]

The Court in *NARUC II* added a second prong to the common carriage test: that customers "transmit intelligence of their own design or choosing."[15] The key consideration is whether the content of the transmission may be under the customer's control. This "control" can be as simple as the decision whether to transmit information or not.[16] The Supreme Court subsequently set forth a definition of communications common carrier that adopted the D.C. Circuit's approach. The Supreme Court defined a communications common carrier as a carrier "that makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[17]

Applying these principles, it is clear that the transmission component of facilities-based wireline broadband Internet access service is a common carrier offering subject to Title II. Under *Computer III*, ILECs may provide information services, including Internet access, as

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11 *Id.*

12 *Id.*

13 *Id.* at 643.

14 *Id.*

15 *NARUC II* at 609.

16 *Id.* at 610.

17 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

customers of their own tariffed offering of the transmission service. In addition, ILECs are offering to provide the telecommunications portion of the service indiscriminately to the public at large. ILECs do not deal on an individual basis with millions of consumers, but undertake to provide service to all on the same terms and conditions. As discussed previously, the transmission component of self-provisioned wireline broadband Internet access is a separate offering to provide a pure transmission path for access to content on the Internet, and users expect and use it as such. Therefore, the transmission component of facilities-based wireline broadband Internet access is a common carrier offering under *NARUC I*.

It is important to note that the D.C. Circuit in *NARUC I* limited the FCC's discretion in determining whether common carrier status applies. The Court held:

> Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.[18]

Thus, the Commission may determine not to apply common carrier status on wireline Internet access providers based on the view that this would achieve its regulatory goal of promoting deployment of broadband.[19] As a matter of fact and law, the transmission component of wireline broadband Internet access is clearly subject to Title II common carrier regulation.

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[18] *NARUC I* at 644.

[19] In the subsequent *NARUC II* decision, the Court indicated that the Commission may have some discretion to refuse to exercise its common carrier regulatory powers. *NARUC II* at 620. Therefore, if the Commission chooses to deregulate ILEC provision of broadband, it may do so under Title II.

D. ILEC Market Power in the Wireline Broadband Market Requires Application of Title II

While dominant carrier status is not a precondition for application of Title II, it nonetheless fully justifies assertion of Title II jurisdiction. The ILECs are clearly dominant in provision of wireline broadband common carriage.[20] Only the ILECs possess the ubiquitous loops and transport facilities necessary to reach consumers and businesses, giving them the ability, absent regulatory safeguards, to leverage control of these bottleneck facilities into control of the telecommunications and information services markets. ILECs have continually attempted to thwart the efforts of competitive providers even under the current safeguards, and removing these safeguards will enable them to engage in unchecked and systematic discrimination against competitors who rely on access to ILEC transmission facilities to provide competitive broadband services.

The Commission has recognized that ILECs continue to have market power with respect to basic local exchange service and that broadband services are provided over the same local exchange and exchange access facilities.[21] ILECs are therefore able to overlay their broadband facilities along their legacy voice telephone network, thus gaining a significant advantage over competing providers who lack their own ubiquitous physical network.[22] If wireline broadband Internet access is removed from Title II regulation, the ILECs will no longer be required to

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[20] *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, Comments of US LEC Corp. (March 1, 2002) (*"US LEC Corp. ILEC Broadband Comments"*) and Reply Comments of US LEC Corp. (April 22, 2002) (*"US LEC Corp. ILEC Broadband Reply Comments"*). US LEC Corp. hereby incorporates its comments and its reply comments in CC Docket No. 01-337 by reference in the present proceeding.

[21] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, ¶ 6, released December 20, 2001 (*"ILEC Broadband NPRM"*). As Chairman Powell notes in his separate statement (at page 1) the ILECs remain "clearly dominant" in local exchange service.

[22] For instance, Project Pronto, which SBC is using to spur deployment of broadband services, is an overlay of the existing SBC voice network meaning it will not displace existing network facilities.

provide competitive broadband providers with access to their local networks on a non-discriminatory basis. Given the sheer economic and logistical impracticality of a competitor being able to duplicate the ILECs' ubiquitous physical network, this would give the ILECs a monopoly on wireline broadband Internet access.

The ILECs' overwhelming share in the wireline broadband Internet access market is plain: approximately 93% of the 2.7 million high-speed DSL lines were reported by ILECs.[23] Approximately 86% of these lines were reported by the Regional Bell Operating Companies (RBOCs), and about 7% of these lines were reported by non-ILECs.[24] Moreover, this percentage is increasing as ILEC DSL customer growth rates are now fast outstripping CLEC customer growth rates.[25] It should be noted that these astounding market shares have been achieved within the very regulatory environment that the ILECs are now seeking to eliminate. If ILECs are freed from their Title II common carrier obligations to provide service on demand,[26]at tariffed rates that are just and reasonable,[27] without unreasonable discrimination,[28] and if ILECs are freed from their interconnection and unbundling obligations in regard to facilities used to provide information services,[29] then the ILECs will be able to drive competitors that rely on their facilities out of the market. Accordingly, ILECs' dominance in the wireline broadband

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23 *FCC Releases Report on the Availability of High Speed and Advanced Telecommunications Capability*, FCC Press Release (Feb. 6, 2002)

24 *Id.*

25 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket No. 98-146, Third Report at ¶ 51 (Feb. 6, 2002) (*"Advanced Telecommunications Third Report"*).

26 47 U.S.C. § 201(a).

27 47 U.S.C. § 203; § 201(b).

28 47 U.S.C. § 202.

29 47 U.S.C. §§ 251, 252.

marketplace in itself justifies the continuation of Title II authority over the transmission capability of facilities-based broadband wireline Internet access.

E. The "Contamination Doctrine" Does Not Apply to ILECs

Under the "contamination doctrine," when a common carrier transmission service is combined with an information service and provided to an end user as a single information service, the information service "contaminates" the communication service and removes it from common carrier regulation.[30] The Commission recognized that if it applied this doctrine to facilities-based carriers, at some point traditional exchange service also would become unregulated because it would be contaminated with the enhanced service of protocol conversion.[31] The Commission noted that this would be an "improper policy result if exchange service remains, as it is now, a near monopoly otherwise warranting regulation."[32] The Commission noted that applying the contamination doctrine to carriers that lacked market power would be inappropriate, since no policy goal is served by regulating any aspect of these entities' offerings.[33] However, for carriers with market power, the Commission noted:

> Conversely, the offerings of dominant carriers are often monopoly or near-monopoly ones. Such offerings are needed and used by competitors and can be manipulated anticompetitively. Ensuring that such offerings continue to be made subject to the common carrier duties of reasonableness and avoidance of unreasonable discrimination serves important policy goals. We propose below to develop policies that apply such a dominant/non-dominant entity split.[34]

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30 GN Docket No. 00-185, Reply Comments of EarthLink, Inc. at 31 (Jan. 10. 2001), *citing*, *Frame Relay Order*, 10 FCC Rcd. At 13719.

31 *Id.*

32 *Id.*

33 *Id.* at ¶ 46, n. 34.

34 *Id.*

Since ILECs remain dominant in provision of wireline broadband and competitors remain virtually exclusively reliant on ILECs for transmission capacity, the Commission should continue to reject the application of the contamination doctrine to ILECs and to separately regulate the transmission component of Internet access service that ILECs provide over their own facilities.

On its website, SBC states that it is working on enabling access for consumers to an "integrated package of broadband access, premium data and Internet services and telephony."[35] Under the contamination doctrine, the telephony aspect would escape regulation because it would be bundled with the information service offerings. To avoid prematurely deregulating ILECs, the Commission should continue to decline to apply the contamination doctrine to facility-based ILECs with market power.

II. TITLE II PROVIDES THE BEST BASIS TO ESTABLISH DEREGULATION WHILE MAINTAINING APPROPRIATE SAFEGUARDS

A. The Commission May Not Have the Authority Under Title I to Establish Adequate Safeguards

The Commission seeks comment on the possibility of applying a "minimal regulatory Title I regime" to wireline broadband Internet access services and the implications this would have on nondiscriminatory access objectives.[36] US LEC is very concerned that Title I does not provide the Commission with sufficient authority to fashion adequate safeguards. First, Title I would force the Commission to rely on ancillary, rather than direct, authority to exercise jurisdiction over wireline broadband Internet access. Second, there is no precedent for a

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35 *See* http://www.sbc.com/data_capabilities/0,5931,1,00.html

36 *NPRM* at ¶¶ 16, 50.

comprehensive scheme of regulation under Title I, meaning there are no parameters in place to define what the Commission can and cannot do pursuant to Title I.

In 1990, the Ninth Circuit held:

> Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 88 S. Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968) (FCC's Title I power "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities"). In the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title II authority is over common carrier services. *See CCIA v. FCC,* 693 F.2d 198, 213 (D.C.Cir.1982) (upholding FCC regulation of enhanced services as ancillary to Commission's authority over interstate basic telephone services); *GTE Serv. Corp. v. FCC,* 474 F.2d 724, 731 (2d Cir.1973) (same).[37]

For the Commission to exercise Title I jurisdiction over Internet access, such jurisdiction would need to be ancillary to its Title II jurisdiction over common carrier services. If, however, the Commission finds no common carrier component to the Internet access service, it may undercut the basis of its ancillary jurisdiction. Therefore, under Title I, it is not clear to what extent the Commission could exercise any affirmative authority over wireline broadband Internet access.

The Commission has also never before established a comprehensive scheme of regulation under Title I. ILECs are currently free to discriminate in provision of services subject only to Title I such as billing and collection services[38] and voice mail service. In fact, the Commission's affirmative exercise of Title I jurisdiction has mainly been limited to preempting state regulation. For instance, when the Commission detariffed ILEC provisioning of inside wiring, it also used

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37 *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990) ("*California I*").

38 *Detariffing of Billing and Collection Services*, 102 FCC 2d 1150 (1986).

its Title I jurisdiction to preempt states from tariffing the service.[39] Likewise in *Computer III*, the Commission attempted to preempt nearly all state regulation of enhanced services.

The Commission describes Title I as a "minimal regulatory . . . regime."[40] The Commission has recognized the limitations of its Title I jurisdiction by noting in regard to ILEC validation and screening services for calling cards that "regulation of these services under Title I ancillary jurisdiction, as suggested by some of the LECs, might not be adequate to ensure provision of these services on a non-discriminatory basis, under just, reasonable and non-discriminatory terms and conditions."[41] Accordingly, the Commission opted for Title II regulation of those services.[42]

For these reasons, it is not at all clear whether the Commission could, under Title I, develop or implement adequate safeguards. For example, the Commission asks how, if it requires access to ILEC transmission services for Internet access, such access should be priced.[43] However, there is nothing in the Commission's current Title I precedent that would clearly support the imposition of such standards under Title I.

Accordingly, in order to be assured that it will have adequate authority to maintain necessary safeguards against discrimination, the Commission should retain Title II regulation over the transmission component of wireline broadband Internet access.

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39 *Promotion of Competitive Networks In Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, ¶ 56 (1999).

40 *NPRM* at ¶ 50.

41 *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Report and Order and Request for Supplemental Comment, FCC 92-168, ¶ 25 (1992).

42 *Id.*

43 *NPRM* at ¶ 50.

B. The Commission May Deregulate Under Title II

In considering its options to reach its stated goals, the Commission should not overlook the fact that Title II, while providing regulatory authority, also permits deregulation where appropriate. The Commission has never been required to exercise the full scope of its authority under Title II. For example, "non-dominant" carriers are subject to Title II but are held only to minimal specific requirements, while "dominant" carriers appropriately remain subject to more extensive regulatory oversight.[44] Section 10 of the Act has given the Commission even more flexibility by allowing it to forbear from applying provisions of the Communications Act, except for interconnection and Section 271 provisions, if certain conditions are met.[45] Therefore, the Commission has ample flexibility under Title II to respond to marketplace conditions and to deregulate as appropriate without the need to turn to Title I.

C. "Private Carriage" Does Not Provide An Adequate Basis for Regulation

The Commission also seeks comment on possible regulation of facilities-based wireline broadband Internet access as private carriage or by oversight of contracts. However, wireline broadband Internet access is clearly not private carriage. ILECs offer broadband service to end users and to the thousands of ISPs in their regions on a public offering basis. They do not and would not negotiate the terms of service with each customer on an individual basis, nor would their clientele be selective and relatively stable. Therefore, the Commission must reject the private carriage approach to regulation of broadband wireline Internet access.

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[44] *Federal Telecommunications Law* at § 3.11. This is not to say that the solution is to classify the ILECs as non-dominant in the provision of broadband services. The record in CC Docket No. 01-337 demonstrates that such a reclassification is not warranted at this time. When conditions in the marketplace change such that ILECs are "non-dominant" then the Commission can adjust Title II obligations as warranted.

[45] 47 U.S.C. § 160.

Any effort to regulate individual contracts would simply not be feasible. First, as noted, ILECs are not able to offer service on an individualized basis to millions of consumers or thousands of ISPs. And, should ILECs use individual contracts, the monitoring and regulation of these contracts would be particularly cumbersome for the Commission and all concerned. Under the *Sierra Mobile* doctrine, an agency may modify a private contract that may "cast upon other consumers an excessive burden," but the contract modification can only follow investigation and a determination that the contract was unjust, unreasonable, unduly discriminatory or preferential.[46] Accordingly, a private carriage or contract approach to regulation of the transmission component of broadband wireline Internet access service would be unsatisfactory because it would impose undue burdens on regulators and provides insufficient assurance of reasonable terms and conditions of service.

III. TITLE II REGULATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS IS IN THE PUBLIC INTEREST

A. Non Discrimination Safeguards Have Been the Key to the Success of the Information Service Marketplace

The *Computer II* regulatory framework was designed to promote and achieve a deregulated information services marketplace. That framework has succeeded so well that the Internet, and the associated increase in demand for telecommunications services, has been a key growth factor for the United States economy and has made the United States the world leader in telecommunications and information services technology. However, this would not have occurred if safeguards, including the *Computer II* unbundling obligations, had not been in place to assure that ILECs could not leverage their control of the local network into control of the

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[46] *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The doctrine has been applied to the FCC. *See Bell Tel. Co. of Pa. V. FCC*, 503 F.2d 1250, 1275-1282 (3d Cir. 1974).

information services market. The Commission's assertion of Title II authority and imposition of appropriate safeguards has strongly served the public interest and should remain in place.

B. Reclassification of Wireline Broadband Internet Access As an Information Service Would Damage the Long Term Viability of Universal Service Funding

Section 254 of the Act requires carriers that provide interstate telecommunications services to contribute to universal service programs and permits the Commission to require any provider of interstate telecommunications to contribute if the public interest requires.[47]

Although the statute on its face seems to identify only the carriers that must contribute, it may also limit contribution liability to the provision of interstate telecommunications or telecommunications service. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). The recent 5th *Circuit Universal Service Remand* calls into question the Commission's authority to impose assessments on a carrier's provision of service other than interstate telecommunications. Therefore, the Commission will be best able to assess universal service contributions on broadband Internet access service providers if it confirms in this proceeding that wireline broadband Internet access service includes a separate offering of a telecommunications service.

The *NPRM*, however, tentatively concluded that wireline broadband Internet access service is provision only of an information service. For all the reasons stated elsewhere in these comments, the Commission should conclude that wireline broadband Internet access service includes a bundled offering of telecommunications service and information service. This is especially important for universal service funding purposes, since the network is rapidly moving toward a fully packetized IP network, so that the Internet will be the network. Accordingly, the

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[47] 47 U.S.C. § 254(d).

Commission should determine in this proceeding that wireline broadband Internet access service includes a bundled offering of a telecommunications service and an information service for the additional reason that this will help assure the long term viability of universal service funding.

C. Classification as a Telecommunications Service Is Essential to the Implementation of National Security, Privacy, and Consumer Protection Statutes

The Commission seeks comment on how its tentative conclusion that broadband Internet access service is an information service with a telecommunications component would affect obligations of telecommunications service providers concerning national security, network reliability, and consumer protection.[48] As discussed below, this tentative conclusion would thwart achievement of important national security, network reliability, and consumer protection goals.

1. CALEA

The Communications Assistance for Law Enforcement Act ("CALEA") requires that all telecommunications carriers' equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications be capable of meeting specific law enforcement assistance capability requirements.[49] CALEA defines telecommunications carriers as "person[s] or entit[ies] engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[50] The definition of telecommunications carrier under CALEA excludes "persons or entities insofar as they are

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48 *See Broadband NPRM*, at ¶ 54.

49 *See generally*, 47 U.S.C. § 1001 *et seq.* ("Communications Assistance for Law Enforcement Act" or "CALEA").

50 47 U.S.C. § 1001(8).

engaged in providing information services. . . ."[51] The Commission has determined that where facilities are used solely to provide an information service, whether offered by an exclusive information service provider or by a common carrier that has established a dedicated information system apart from its telecommunications systems, such facilities are not subject to CALEA.[52]

If the Commission were to determine that the provision of broadband Internet access service is an "information service," as opposed to a telecommunications service, the provision of such service would not be subject to the requirements of CALEA. Categorizing broadband Internet access as an information service threatens to undermine CALEA and will undoubtedly complicate CALEA compliance, particularly as the proliferation of packetized IP-based networks blurs the ability to distinguish between PSTN-equivalent voice services and data and information services.

It is highly unlikely that Congress intended the broadband capability of the telephone network to be categorically excluded from CALEA. Therefore, the Commission should determine that wireline broadband Internet access is in part a telecommunications service in order to assure that the goals of CALEA are met and that law enforcement agencies have the necessary law enforcement tools as the public switched network evolves towards a more advanced broadband capability.

2. Network Reliability and Interconnectivity

Section 256 of the Act provides that the Commission "shall establish procedures for . . . oversight of coordinated network planning by telecommunications carriers and other *providers of telecommunications services* for the effective and efficient interconnection of public

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[51] *See* 47 USC §1002(b)(2)(A).

[52] *See Communications Assistance for Law Enforcement Act*, Further Notice of Proposed Rule Making, 13 FCC Rcd 22632 (1998), at ¶ 68.

telecommunications networks used to *provide telecommunications services.*"[53] In enacting Section 256, Congress intended to preserve interconnectivity of the public telecommunications network. However, the Commission's authority to oversee and coordinate network planning is limited in Section 256 to telecommunications carriers and other providers of telecommunications services.[54] Therefore, if the Commission were to determine that broadband Internet access services are information services, the Commission would not be able to coordinate network planning and interconnectivity with respect to these services. Congress could not have intended for Section 256 to only apply to the provision of narrowband telephone service. Accordingly, the Commission should classify the transmission component of wireline broadband Internet access as telecommunications services in order to permit the Commission to oversee broadband interconnectivity as Congress intended.

3. Discontinuance of Service

Section 214 of the Communications Act limits the ability of telecommunications carriers to unilaterally discontinue telecommunications service. If the Commission were to find that wireline broadband Internet access is exclusively an information service, providers would be able to discontinue service without regard to Section 214. While the Commission notes that discontinuance applications are routinely granted,[55] the Commission's rules contain important consumer protection requirements requiring customer notice and allowing users to appeal to the Commission if the discontinuance will cause unanticipated harm to their business or the customers they serve. Moreover, the Commission has recently started heightened oversight of

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53 47 U.S.C. Sec. 256 (b) (emphasis added).

54 *See* 47 U.S.C. § 256(b).

55 *See Broadband NPRM*, at ¶ 57, n.99.

discontinuance applications.[56] The increasing importance of broadband Internet connectivity to consumers and businesses, and the evolution of the network toward integration with the Internet, mandates that the Commission maintain its regulatory oversight over the transmission component of wireline broadband Internet access service. Accordingly, the Commission should determine that the telecommunications component of broadband Internet access service is an offering of telecommunications service subject to Title II obligations in order to assure that discontinuances of service do not unduly harm the public interest.

4. Customer Proprietary Network Information

In order to safeguard consumer's privacy, the Act limits telecommunications carriers' dissemination of customer proprietary network information ("CPNI") derived from the provision of telecommunications services.[57] Specifically, Section 222(c)(1) states that the privacy protection requirements of that Section apply to CPNI gained by a carrier "by virtue of its provision of a *telecommunications service* ..."[58] Therefore, if the Commission classifies wireline broadband Internet access service exclusively as an information service, CPNI gained by virtue of provision of wireline broadband Internet access will not be subject to the protections of Section 222. Congress could not have intended this result because under the current regulatory framework ILECs provide Internet access service as customers of their own tariffed telecommunications services and thus are subject to Section 222 with respect to the information services they provide using those tariffed services. Accordingly, the Commission should classify

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56 FCC Public Notice, Reminder to Common Carriers Regarding Discontinuance of Domestic Service Under Section 214 of the Communications Act, DA-01-1173 (rel. May 8, 2001).

57 *See* 47 U.S.C. § 222(a).

58 *See* 47 U.S.C. § 222(a) (emphasis added).

the provision of wireline broadband Internet access services as including a telecommunications service in order to protect Consumers' privacy rights as intended by Section 222.

5. Access by Persons with Disabilities

The Act also contains protections to ensure that telecommunications services are accessible to and usable by persons with disabilities. These protections would also be eliminated if wireline broadband Internet access were to be classified as exclusively an information service. Section 255 of the Act provides that " *a provider of telecommunications service* shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[59] Classifying wireline broadband Internet access service as exclusively an information service would therefore exclude persons with disabilities from Section 255 protections for wireline broadband Internet access services. Again, the proposed reclassification of wireline broadband Internet access services as an information service threatens to undermine yet another key consumer protection provision. Congress could not have intended this result. Therefore, the Commission should define wireline broadband Internet access as being comprised in part of a telecommunications service in order to preserve access by persons with disabilities to the Internet.

6. Intermodal Competition Will Not Adequately Safeguard Consumers

The Commission also seeks comment generally on whether the consumer protection provisions of the Act are necessary in light of the differences in the market structure between analog voice services and broadband Internet access services.[60] Specifically, the Commission refers to the fact that intermodal competition among multiple broadband platforms may eliminate

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[59] 47 U.S.C. § 255 (c) (emphasis added).

[60] *See Broadband NPRM*, at ¶ 60.

the need for consumer protection/flow regulations in the broadband Internet access services marketplace. It is far too soon to know whether, and how, intermodal competition will develop in the broadband Internet access services marketplace. Only five to ten percent of U.S. households have subscribed to broadband Internet access.[61] The penetration rate of broadband Internet access services is too low to extrapolate any useful data about what the larger market will eventually look like. Currently, the market is not dominated by many competitors, but by two: cable and the regional ILEC, both of which have been steadily raising their prices. In many geographic areas, broadband Internet access will probably be dominated by one provider for the foreseeable future due to the tremendous economic advantages that the "first mover" has in the deployment of facilities that support such services. Therefore, there is no basis for the Commission to conclude that intermodal competition has obviated the need for consumer protection provisions that would be undermined by determining that wireline broadband Internet access is exclusively an information service.

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[61] *See US LEC Corp. Reply Comments In Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunication Services,* CC Docket No. 01-337, Declaration of Lee L. Selwyn, ¶ 11 (*"Selwyn Study"*). US LEC hereby incorporates the *Selwyn Study* by reference in the present proceeding.

D. State Authority Could be Adversely Impacted

In the *NPRM*, the Commission seeks comment on how classification of wireline broadband Internet access services as exclusively an information service would impact the balance of federal and state responsibilities over the network, particularly in light of the fact that the Commission has found that xDSL transmission used to provide Internet access services are subject to Commission jurisdiction.[62]

Under the Act, states exercise authority over intrastate telecommunications service which they regulate as common carriage. The Act provides that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices services, facilities, or regulations for or in connection with intrastate communication service . . . ."[63] A pronouncement by the Commission that ILEC broadband capability is, in fact, not subject to common carrier regulation because it is used exclusively to provide an information service could have a profound impact on the ability of states to regulate broadband services.

States play an important role in the regulation of wireline broadband Internet access and protecting consumer interests. The California PUC recently rejected a motion by Pacific Bell Telephone Company and SBC Advanced Solutions, Inc. to dismiss a competitor's complaint alleging unlawful discrimination in the provision of DSL transport services. The CPUC found that it had concurrent jurisdiction with the Commission over the provision of xDSL Internet access services.[64] The CPUC relied in part on the traditional police power of the states to

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62 *See NPRM* at ¶ 62.

63 47 U.S.C. § 152(2)(b).

64 *See California ISP Ass'n v. Pacific Bell Tel. Co. and SBC Advanced Solutions, Inc.*, Case 01-07-027, California Public Utilities Commission (filed July 26, 2001), Assigned Commissioner's and ALJ's Ruling Denying Defendants' Motion to Dismiss (rel. Mar. 28, 2002).

safeguard consumer health, safety and welfare and to enforce their own laws with regard to interstate services provided to California customers.[65]

Other states have also been active in assuring nondiscriminatory access to ILEC broadband capability. The Illinois Commerce Commission ("ICC") has ensured competition in the provision of broadband Internet access facilities. In October 1999, SBC announced its $6 Billion Project Pronto initiative to extend new fiber-fed loop facilities to millions of end-users. In February 2001, the ICC became the first state commission to order the unbundling of the fiber-fed loop architecture and since that time the Tennessee Regulatory Authority and the Wisconsin Public Service Commission have also ordered unbundling of the fiber-fed loop.[66] In the course of its deliberations, Ed Whitacre, Chairman and CEO of SBC, wrote in a letter to Speaker Hastert and other legislators that the Illinois decision would make it "economically impossible" for SBC to deploy Project Pronto in the state. The letter warned that, because of SBC's decision to halt Project Pronto in Illinois, the affected consumers "cannot now, and may never, have access to DSL."[67] Commissioner Harvill accurately noted that the very fact that SBC's threatened halt to Project Pronto could mean that some consumers would never have access to DSL demonstrated precisely SBC's dominance of the market and why it was therefore important for the ICC to aggressively enforce SBC's unbundling obligations.

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65 *Id.*

66 See Arbitration Decision on Rehearing, In the Matter of Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a/ Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, et al., Illinois Commerce Commission, Docket Nos. 00-0312 and 00-0313, Illinois Commerce Commission (Feb. 15, 2001) and Order (Mar. 14, 2001); see also Generic Docket to Establish UNE Prices for Line Sharing Per FCC 99-355, and Riser Cable and Terminating Wire as Ordered in TRA Docket 98-00123, Tennessee Regulatory Authority, First Initial Order, Docket No. 00-00544 (Apr. 3, 2002); Investigation into Ameritech Wisconsin's Unbundled Network Elements, Docket No. 6720-TI-161, Wisconsin Public Service Commission (Mar. 22, 2002).

Contrary to the *GTE Order,*[68] states have concurrent jurisdiction over the provision of xDSL services used to provide Internet access services. As the Supreme Court stated, Congressional intent must be "clear and manifest" in order to displace state regulation.[69] Similarly, federal preemption of state regulation "must be clear and occurs only in limited circumstances."[70] Under Section 2(b) of the Act, Congress left the states with substantial authority so long as state regulation does not conflict with the Commission's authority over interstate communications. Therefore, the Commission should define wireline broadband Internet access service as a telecommunications service to preserve state authority over ILEC intrastate broadband services.

IV. ILECS MAY COMPETE INTERMODALLY AS COMMON CARRIERS SUBJECT TO TITLE II

ILECs have recently conducted public policy initiatives before Congress and this Commission attempting to persuade policy makers that they must be relieved of all obligations to permit access by intramodal competitors to the broadband capability of their networks because of intermodal competition from cable operators. Thus, preceding the *NPRM,* ILECs urged the Commission to define their broadband network capability as subject only to Title I and will undoubtedly do so in this proceeding.[71]

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67 Letter from Ed Whitacre, Chairman and Chief Executive Officer, SBC Communications, Inc., to the Honorable J. Dennis Hastert, U.S. House of Representatives 1 (Mar. 14, 2001), http://www.icc.state.il.us/icc/tc/cond29.asp

68 *See GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 (rel. Oct. 30, 1998) ("*GTE Order*").

69 *See Jones v. Rath Packing*, 430 U.S. 519, 525 (1977).

70 *See Communications Systems Int'l v. the Cal. Pub. Utils. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

71 *See* Letter from William P. Barr, Verizon, to Michael K. Powell, Chairman, Federal Communications Commission (Jan. 9, 2002) (on file with Commission).

The Commission should reject this argument because ILECs are fully able to compete intermodally as common carriers subject to Title II. Under the current regulatory regime, ILECs are able to provide Internet access and other information services including video programming as customers of their own common carrier services. Thus, they are not precluded from competing under current rules. In fact, as noted herein, ILECs have been incredibly successful in rolling out DSL service. ILECs provide 93% of intramodal broadband Internet access and nearly half of intermodal broadband Internet access. ILEC claims that they are hindered by Title II regulation in competing intermodally in the broadband marketplace are belied by these facts. Therefore, ILEC arguments that they should be relieved of Title II obligations to provide nondiscriminatory access to competitors in order to permit intermodal competition is no more than an elaborate smoke screen to obscure the facts and achieve the ILECs' ultimate goal of being able to engage in systematic anti-competitive behavior with little or no regulatory checks or oversight.

Even under current safeguards, ILECs persist in efforts to harm and discriminate against competitors. This discrimination is, unfortunately, the primary explanation as to why ILECs have been successful in capturing 93% of the intramodal broadband Internet access market.

V. THE COMMISSION SHOULD RETAIN *COMPUTER III* SAFEGUARDS INCLUDING THE REQUIREMENT THAT THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE BE OFFERED SEPARATELY

A. *Computer Inquiry* Safeguards Are Not Obsolete In a Broadband Environment

In the *NPRM*, the Commission seeks comment on whether the *Computer Inquiry* requirements should be modified or eliminated for facilities-based wireline broadband Internet

access services.[72] The Commission suggests that these requirements may not apply to broadband Internet access services because the restrictions imposed in the *Computer Inquiry* proceedings were initiated "at a time when very different legal, technological and market circumstances presented themselves to the Commission" and addressed services "more akin to voice mail and other narrowband applications," rather than broadband services.[73] Contrary to the Commission's suggestion, however, the safeguards established in the *Computer Inquiry* proceedings are equally applicable to, and necessary for, broadband Internet access services. The information services market has evolved tremendously since the creation of the basic/enhanced services dichotomy, but as is evident in the Commission's *Computer Inquiry* proceedings, the *Computer Inquiry* safeguards were designed to accommodate new and emerging technologies, including broadband services. Moreover, the legal, technological and market factors underlying the fundamental principles of the *Computer Inquiry* proceedings, upon which the safeguards are based, are equally valid today in the broadband services market. Thus, at a minimum, the existing *Computer Inquiry* safeguards must remain in place for broadband access services.

In its *NPRM*, the Commission suggests that because the technological characteristics of broadband Internet access services did not exist at the time of the initial *Computer Inquiry* proceedings, the policies and requirements implemented in those proceedings may not apply to broadband Internet access services. Rather, the Commission indicates that such safeguards should be limited to narrowband technologies.[74] While it is true that there have been tremendous technological advances associated with the provision of enhanced services, the Commission recognized and took into consideration future technological advances for both basic and

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72 *NPRM* at ¶ 43.

73 *Id.* at ¶¶ 31, 35.

enhanced services when it established its basic and enhanced regulatory regime and corresponding safeguards.[75]

The Commission's initiation of the *Computer Inquiry* proceedings arose from the realization that the traditional telephone network was no longer limited to providing plain old telephone services and that technological evolution allowed the provision of computer and data processing (enhanced) services over these networks.[76] The Commission's *Computer Inquiry* proceedings focused on the degree of regulation that should apply to enhanced services and the basic services used to transmit them. The result was the creation of a basic/enhanced services dichotomy, in which the Commission separated the basic common carrier transmission services from the rapidly evolving enhanced services,[77] finding separate regulatory schemes for these services necessary to address the functional and competitive differences between them.[78]

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74 *NPRM* at ¶¶ 36-37.

75 *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Final Decision and Order,* 28 F.C.C.2d, 268-69 (1971) *("Computer I")* (finding that data processing will be a major force in the economy "in both absolute and relative terms in the years ahead"); *see also See Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision,* 77 F.C.C.2d 384, 425 (1980) (*"Computer II"*)(where the Commission refused to classify different categories of enhanced services because in "a market as vibrant as enhanced services" such a distinction "may miss important new developments").

76 *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 7 F.C.C.2d 11 (1966) ("*Computer I NOI*").

77 The Commission defined basic service as "the common carrier offering of transmission capacity for the movement of information," including, analog or digital transport of voice, data and video. *Id.* at 419. The Commission held that basic services provide "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information." *Id.* at 420. The Commission defined "enhanced service" as a service that "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387; *see also* 47 C.F.R. § 64.702(a). Following the passage of the 1996 Act, the Commission found that Congress intended to maintain the basic/enhanced distinction in its definitions of "telecommunications services" and "information services" and that "enhanced services" and "information services" were synonymous. *See Federal State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 111501, 11516-17, 11520, 11524 (1998).

78 *Computer II,* 77 F.C.C.2d 384.

The Commission's establishment of the basic/enhanced dichotomy evolved from advances in microprocessor technology that permitted data to be processed outside of a central location and at intermediate locations or even within customer premises equipment ("CPE").[79] Such distributed processing of data utilizes the telecommunications network and is the fundamental basis for the establishment of the basic transmission service classification in *Computer II*. In that proceeding, the Commission made it clear that its basic service classification was not meant to restrict "a carrier's ability to take advantage of advances in technology in designing its telecommunications network."[80] The Commission recognized that basic service can be offered utilizing different bandwidths, as well as different analog and digital capabilities.[81] The Commission also stated that "[u]se internal to the carrier's facility of communications techniques, bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc. *that facilitate economical, reliable movement of information does not alter the nature of the basic services.*"[82] Thus, the Commission's establishment of the basic services classification and associated regulation took into account the future technological potential of such services. Indeed "distributed processing" directly foreshadowed the Internet.

The Commission also took into consideration the future potential of enhanced services. Indeed, the rapid evolution of technology in the enhanced services market served as a key factor in the Commission's establishment of the basic/enhanced services dichotomy.[83] Finding that the

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79 *Id.* at 391-93.

80 *Id.* at 420.

81 *Id.* at 419.

82 *Id.* at 420 (emphasis added).

83 *See Computer II*, 77 F.C.C.2d at 433.

market for enhanced services was effectively competitive and seeking to promote and foster this competition, the Commission held that enhanced services should not to be subject to Title II common carrier regulation.[84] The Commission found that such services would "flourish best" in a competitive market and would provide the public with "a wider range of existing and new data processing services."[85] The Commission found that its decision in *Computer I* to forgo regulation of data processing was "largely accurate" and "[i]f anything, it was overly conservative as to the extent to which market applications of computer processing technology would evolve."[86] The Commission confirmed its finding that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market."[87] The Commission also noted that "the pressure on a set of administrative rules which fail to recognize the growth in operational sophistication demanded by our nation's economy will be inexorable."[88] Thus, it is clear that when the Commission established the basic/enhanced services distinction consideration of future technologies and services was a key component to its analysis.

Moreover, the key Computer I*nquiry* safeguards, such as the unbundled offering of basic service, are not technology specific. They can, and do currently, apply equally to narrowband and broadband services. There is nothing in the key *Computer III* safeguards or framework that suggests they were intended only for the narrowband network.

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84 *Id.* at 423-33.

85 *Id.* at 433.

86 *Id.*

87 *Id.* at 434.

88 *Id.* at 422.

Accordingly, the policies and safeguards established in the basic/enhanced services regulatory regime also apply to future technologies and services. Throughout the history of the *Computer Inquiry* proceedings, the primary purpose of this dichotomy and the need for the safeguards has been to address the reliance of the enhanced services on basic transmission services.[89] The Commission found that "enhanced services are dependent upon the common carrier offering of basic services and that a basic service is the 'building block' upon which enhanced services are offered."[90] The Commission consistently has determined that dominant facilities-based carriers providing both basic and enhanced services have an incentive to discriminate against competing enhanced service providers that seek to purchase the underlying transmission capacity from the dominant carriers.[91] Thus, to protect the competitive nature of enhanced services, the Commission retained Title II common carrier regulation of the basic transmission services used to provide these services.[92]

Based on these fundamental principles, the Commission has placed restrictions on facilities-based carriers providing both basic and enhanced services. Specifically, the Commission requires carriers that "'own common carrier transmission facilities and provide enhanced services [to] unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they

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89 *Computer I*, 28 F.C.C. at 269; *see also Computer II*, 77 F.C.C.2d 384; and *Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order*, 104 F.C.C.2d 958 (1986) ("*Computer III Phase I Order*").

90 *Id.*

91 *See In Re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, 16 FCC Rcd. 7418, 7420 (2001)("*CPE/Enhanced Services Unbundling Order*").

92 *Id.* at 428.

provide such services to their own enhanced service operations.'"[93] The Commission also has imposed additional safeguards on the BOCs, including the Comparably Efficient Interconnection (CEI), Open Network Architecture (ONA), cost allocation and network disclosure requirements.[94]

Changes in technology may have improved transmission speeds and allowed the transfer and use of more sophisticated data and broadband services, but broadband providers still rely on basic transmission services interconnected with the telecommunications network to provide these broadband services. Indeed, the Commission has continued to apply the *Computer Inquiry* safeguards to new technologies, including high-speed, packet-switching services.[95] As the Commission found in its *Frame Relay Order*, treating the high-speed, packet-switching frame relay service as a basic service "provides competitive access to the underlying basic service of facilities-based carriers who are often better able to implement new communications technologies. This access allows competing enhanced service providers to more easily enter and compete in the market for such technologies."[96] Although during the course of the *Computer Inquiry* proceedings, the Commission has modified the level of restrictions governing the provision of basic and enhanced services,[97] it has not eliminated the requirement that the

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93 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. at 7421 (citing the *Frame Relay Order*, 10 FCC Rcd. 13717, 13719 (1995)); and *Competition in the Interstate Interexchange Marketplace*, CC docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 4562, 4580 (1995).

94 The Commission eliminated the latter rules, finding that the Section 251(c)(5) network disclosure rules of the 1996 Act were as comprehensive, if not more so, than the *Computer III* disclosure rules. *Computer III Further Remand Order*, 14 FCC Rcd. at 4316-17. The BOCs also are subject to the Commission's cost-accounting rules to prevent cross-subsidization between the regulated transmission services and the unregulated enhanced services. See 47 C.F.R. Parts 31, 43, 67 and 69.

95 *See Frame Relay Order*, 10 FCC Rcd. 13,717.

96 *Id.* at 13,722.

97 In its *Computer II* proceeding, the Commission required the dominant Bell Operating Companies to establish a separate subsidiary for the provision of enhanced services, which was required to purchase its transmission capacity from the parent company's tariff. *Computer II*, 77 F.C.C.2d 384. In its *Computer III*

basic transmission component be separated from the enhanced service. In addition, after over 30 years of addressing this issue -- and even more significantly, post-1996 Act -- the Commission, in a decision released only a year ago, found that the underlying transmission service used to provide information services is still a critical input for enhanced service providers,[98] and currently is applying these safeguards to the BOCs' provision of broadband services.[99]

The Commission's own *Computer Inquiry* policies recognize that technological distinctions in services are irrelevant to basic/enhanced services regulation if dominant control over the facilities essential to provide these services still exists. As discussed herein[100], the BOCs still are dominant in the local exchange market and still control essential bottleneck facilities used to provide broadband services. Thus, the fundamental principles of dominant control over transmission facilities and the potential for discrimination that served as the basis for the establishment of the *Computer Inquiry* policies and safeguards[101] still apply today and require that these anti-discrimination safeguards remain in place for broadband access services.

The *NPRM* also cites the pro-competitive and deregulatory policies of the 1996 Act that are aimed at the development of the Internet and deployment of advanced services, suggesting

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proceeding, the Commission eliminated the separate subsidiary requirement and replaced it with non-structural safeguards including the Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA) requirements. *Computer III, Phase I Order*, 104 F.C.C.2d 958. Currently the BOCs are permitted to provide bundled basic and enhanced services, but only subject to the restrictions and safeguards associated with providing these services, including non-discriminatory access to the underlying transmission services.

98 *Id.* Indeed, the Commission found that the transmission component was such a critical input that it imposes the same separation requirements on non-dominant carriers. *Id.* at 7442-43.

99 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. At 7425.

100 *Supra* pp. 13-15.

101 *See Computer II*, 77 F.C.C.2d at 422 (noting that as "the market applications of computer technology increase, communications capacity has become the necessary link allowing the technology to function more efficiently and more productively").

that the statutory mandates may be different than those considered in the *Computer Inquiry* proceedings.[102] Contrary to the Commission's suggestion, however, the statutory mandate underlying the *Computer Inquiry* policies is consistent with the statutory mandate governing broadband access services. As the basis for its *Computer Inquiry* rules, the Commission cites to its mandate pursuant to Section 151 of the Act "to make available 'to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . .'"[103] In its *NPRM*, the Commission cites to the statutory mandate of Section 706 to encourage "'the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .'" as the basis for its regulation of broadband access services.[104] As is evident in the language of both of these provisions, the Commission's goal under both statutory provisions is similar—to establish rules and policies that will make communications and advanced telecommunications available to all Americans. Thus, it follows that the Commission's pro-competitive policies governing enhanced services in the *Computer Inquiry* proceedings are consistent with the pro-competitive policies set forth in the 1996 Act. Indeed, nearly 30 years ago, the Commission found the enhanced services market truly competitive, stating that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market."[105] At the same time, however, the Commission recognized that the transmission component underlying the provision of enhanced services was owned and controlled by dominant carriers seeking to compete directly with the enhanced service

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102 *NPRM* at ¶ 35, n. 69.

103 *Computer I*, 28 F.C.C.2d at 268 (citing 47 U.S.C. § 151).

104 *NPRM* at n.69 (citing 47 U.S.C. § 157).

105 *Computer II*, 77 F.C.C.2d at 433-34.

providers—a critical factor that had the potential to threaten this competitive market.[106] As is evident, this same concern exists in the broadband access services market today and, therefore, the same policies must apply.

Throughout the current history of the *Computer Inquiry* proceedings, the Commission has adapted its regulations to the changes in the enhanced services market and modified its restrictions and safeguards, accordingly. But, the Commission has always found -- even as recently as a year ago -- that the continued dominance of the ILECs in the local market warrants the retention of the *Computer Inquiry* safeguards. The status of market conditions for broadband Internet access services has not changed so dramatically in the last year to justify such a radical departure in the Commission's regulations aimed at protecting competitive service providers from discrimination. It is significant to note that, in assessing the impact of the pro-competitive requirements of the 1996 Act on the *Computer Inquiry* safeguards, the Commission stated that

> "[a]lthough many ISPs compete against one another, each ISP must obtain the underlying basic services from the incumbent local exchange carrier, often still a BOC, to reach its customers. Although . . . under the 1996 Act, the BOCs are subject to additional statutory requirements, such as the Section 251 unbundling and the network information disclosure requirements . . . we cannot yet conclude that the pro-competitive goals of the 1996 Act have been fully reached."[107]

In sum, there is nothing about wireline broadband Internet access services that justifies exempting these services from the fundamental principles governing common carrier regulation and protection against discrimination and anticompetitive behavior that lay at the heart of the *Computer Inquiry* policies and safeguards. Indeed, these principles are critical to promoting competition in the broadband access market. Information service providers must compete with

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106 *Id.* at 475.

107 *See In Re Computer III Further Remand Proceedings*, 14 FCC Rcd. 4289, 4301 (1999) ("*Computer III Further Remand*") (refusing to remove the safeguards established to protect ISPs from discriminatory treatment).

dominant ILECs in the provision of broadband Internet access services. The ILECs still are dominant carriers in the local exchange and exchange access markets and have an incentive to discriminate against their competitors in the provision of broadband access services. Non-facilities-based ISPs still rely on the ILECs for the transmission capacity used to transmit their broadband access services to their customers and this transmission capacity remains the critical input for the provision of these services. Thus, there is no legal, regulatory, or market distinction that supports the elimination of the *Computer Inquiry* safeguards with respect to wireline broadband Internet access services.

B. The Separate Common Carrier Offering of the Transmission Component Preserves the Possibility of Section 251(c)(3) Unbundling Obligations

Even if the Commission classifies wireline broadband Internet access service as an information service, it should continue to require incumbent local exchange carriers to offer the transmission component of such services as telecommunications services. As demonstrated above, this transmission component has all of the indicia of a telecommunication service and should be made available on a common carrier basis.[108] A critical factor underlying a common carrier classification of these transmission services is the need to preserve the Section 251(c)(3) unbundling requirements. [109]

Section 251(c)(3) requires ILECs to provide telecommunications carriers with non-discriminatory access to unbundled network elements "*for the provision of a telecommunications service.*"[110] Section 153(29) defines a "network element" as "a facility or equipment *used in the*

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108 *See supra* pp. 7-16.

109 47 U.S.C. § 251(c)(3).

110 47 C.F.R. § 251(c)(3) (emphasis added).

provision of telecommunications services."[111] Under these provisions, US LEC believes that any ILEC facility that is used by a CLEC to provide a telecommunications service meets the definition of "network element" and is eligible for unbundling even if the ILEC itself does not use the facility to provide a telecommunications service. However, ILECs will undoubtedly argue that the ILEC facility does not meet the definition of a network element unless the ILEC itself uses it to provide a telecommunications service. Therefore, if the Commission, as it indicates in the *NPRM*, defines the transmission component of broadband access services as "telecommunications" and not "telecommunications services," then network facilities used to provide such access services could not be subject to the requirements of Section 251(c)(3) under the ILEC view. This means that competing carriers seeking to provide broadband access services in competition with the ILECs would not have access to the network elements necessary to provide their services. [112]

The Commission itself has recognized the benefits of the Section 251(c)(3) unbundling requirements for ISPs, stating that:

> Because local telecommunications services are important inputs to the information services ISPs provide, ISPs are uniquely positioned to benefit from an increasingly competitive local exchange market. There is evidence, for example, that carriers that have direct rights under Section 251 will compete with the incumbent LECs to provide pure ISPs with the basic network services that ISPs need to create their own information

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[111] 47 U.S.C. § 153(29) (emphasis added).

[112] Section 251(d)(2) sets forth a "necessary" and "impair" test that applies to proprietary and non-proprietary network elements, respectively, to determine whether an element must be made available to competing carriers. 47 U.S.C. § 251(d)(2). Based on these tests, the Commission has identified several key network elements that must be made available to competing carriers, including loops and interoffice transmission facilities. The loop UNE includes high-capacity lines, dark fiber, line conditioning, and some inside wire. The interoffice transmission facilities include dedicated transport from DS1 to OC96 and higher capacity levels. Loop and interoffice transmission facilities, as well as other UNEs, are key network components used to provide the transmission path that is necessary for competing telecommunications carriers and ISPs to offer their information services. *In Re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking*, __ F.C.C. Rcd. ____ (2001) ("*Triennial UNE Review*") (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 3696, 3721 (1999) ("*UNE Remand Order*")).

> service offerings, either by obtaining unbundled network elements for the provision of telecommunications services or through the resale of such services. As a result, incumbent LECs have an incentive to provide an increased variety of telecommunications services to pure ISPs at lower prices in response to the market presence of such competitors.[113]

These benefits cannot be realized, however, if the Commission fails to classify the transmission component of broadband access services as telecommunications services.

The primary purpose of the unbundling requirements is to promote competition. As demonstrated above, however, the ILECs remain dominant in the provision of broadband services,[114] and control key network facilities in the local exchange and exchange access market that are used to provide broadband services.[115] Absent a "telecommunications service" classification, the ILECs will have an incentive to designate separate facilities as facilities used for broadband services, effectively cutting off access to these bottleneck facilities that are only available under Section 251(c)(3). ILECs will have a potential regulatory loophole by which they can disguise their services and facilities as broadband, thereby avoiding the regulations necessary to control the ILECs market power. Such a result not only jeopardizes competition in the broadband access market, but also threatens competition in the local exchange market.

This principle also is a key factor underlying the ONA requirements implemented in the Commission's *Computer Inquiry* proceedings. It is significant to note that the Commission's rules on the ONA requirements were remanded by the Court of Appeals for the Ninth Circuit for failure to provide sufficient protection against access discrimination.[116] In addressing this remand issue, the Commission cited to the Section 251 unbundling requirements as another

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113 *Computer III Further Remand NPRM*, 13 F.C.C. Rcd. at 6061-62.

114 See *supra* pp. 13-16.

115 *Id.*

116 *See California v. Commission*, 39 F.3d 919 (9th Cir. 1994).

safeguard against discrimination for enhanced service providers that "should alleviate the court's underlying concern . . . that the level of unbundling required under ONA does not provide sufficient protection against access discrimination."[117] If the Commission removes the common carrier component of the provision of broadband access services, it not only will eliminate the requirements of Section 251, it will also eliminate the basis for the ONA requirements imposed in the *Computer Inquiry* proceedings, thereby removing key safeguards against discrimination in the information services market. Such a result is nearly fatal to competition in the broadband access market and is contrary to the pro-competitive goals of the 1996 Act.

C. Sections 201 and 202 Ensure That Access to Underlying Transmission Capacity for Information Services is Provided Under Just and Reasonable Rates and on a Non-Discriminatory Basis

If the transmission component of wireline broadband Internet access is not regulated as a telecommunications service under Title II of the Act, providers of broadband access services will lose the critical protections of Sections 201 and 202. As the Commission notes in its *NPRM*, ISPs and others currently purchase the transmission needed for their broadband services from tariffs.[118] The terms and conditions of these tariffed services are governed by the just and reasonable and non-discriminatory mandates of Sections 201 and 202 of the Act. If the provision of transport services necessary to provide broadband access services is no longer subject to these Title II requirements, then dominant carriers that provide competing broadband access services, while also controlling the underlying transmission capacity, will be free to discriminate against their broadband access competitors.

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117 *Computer III Further Remand NPRM*, 13 F.C.C. Rcd. at 6062.

118 *NPRM* at ¶ 50.

Section 201(b) requires that the rates, terms, and conditions in providing such services be just and reasonable.[119] In addition, Section 202(a) of the Act, makes it unlawful for any common carrier to impose unjust or unreasonable discrimination for rates, terms, conditions, facilities or services in connection with like communication services.[120] Sections 201(b) and 202 were cited by the Commission in its *Computer Inquiry* proceedings as primary safeguards for ensuring that ISPs obtain transmission services on nondiscriminatory terms and conditions. Specifically, the Commission emphasized that all carriers, including dominant and non-dominant carriers have a "firm obligation under Section 202 of the Act to not discriminate in their provision of transmission service to competitive Internet or other enhanced service providers."[121] The Commission also noted that Section 201(b) prohibits discrimination in rates, terms or conditions that would favor the carrier itself, over a competing enhanced service provider.[122] In citing these statutory safeguards, the Commission sought to reassure ISPs that they would have non-discriminatory access to the transmission services they needed to provide their information services.[123] If the underlying transport for broadband access services is not regulated as a Title II common carrier service, these protections against discrimination will disappear. As explained above, the concerns underlying the Commission's findings in the *Computer Inquiry* proceedings have not changed and are equally valid today. Accordingly, it is essential that the underlying transmission component of broadband access services be classified as telecommunications services and be subject to Title II common carrier regulation.

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119 47 U.S.C. § 201(b).

120 47 U.S.C. § 202(a).

121 *CPE/Enhanced Services Unbundling Order* at ¶ 46.

122 *Id.*

123 *Id.*

D. *Computer Inquiry* Safeguards Create the Right Incentives for Deployment of Broadband

In its *NPRM*, the Commission seeks comment on the impact of the *Computer Inquiry* requirements on the deployment of broadband Internet access services.[124] As explained below, it is not necessary for the Commission to remove these safeguards in order to encourage further deployment of these broadband services. To the contrary, if the Commission were to eliminate these safeguards, it would have a detrimental impact on the deployment of broadband services.

As the Commission recently found, the deployment of advanced services to all Americans is proceeding in a "timely and reasonable manner," and the advanced services market "continues to grow."[125] This growth is occurring even with the current *Computer Inquiry* safeguards in place.[126] Facilities-based CLECs entering the market are investing in and constructing fiber optic networks designed to meet the high-speed data needs of today's consumers. In response to this competitive challenge, the ILECs also have been investing in and upgrading their networks for the provision of advanced high-speed services despite the common carrier regulations imposed on the provision of their services.[127]

It is an undisputed fact that it is competition that creates the incentive to invest in and deploy advanced technologies. In its reports on the status of the deployment of advanced telecommunications the Commission has stated, "competition, not regulation, holds the key to

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124 *NPRM* at ¶ 52.

125 *See In Re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Third Report*, CC Docket No. 98-146, Commission 02-33 (rel. Feb. 6, 2002).

126 *See infra* pp. 52-54.

127 *Id.*

stimulating further deployment."[128] The Commission also recognized that "there may be important legal, policy, technological, or other differences among classes of providers that require disparate regulatory treatment of such providers."[129] And, thus, it is regulatory requirements, such as the *Computer Inquiry* safeguards, that protect and promote this competition, recognizing that the dominant position of the ILECs requires special regulatory treatment. Without these safeguards, competition in the broadband market will be stymied and the ILECs will no longer have an incentive to invest in these advanced technologies. Indeed, in its *Frame Relay Order*, the Commission found that "under the *Computer II* and *Computer III* decisions, competitive access has promoted the public interest by accelerating the deployment of emerging technologies such as frame relay."[130] For these reasons, the *Computer Inquiry* safeguards create the correct incentive to promote competition in the broadband Internet access services market, and thereby, continued deployment of wireline broadband capability.

E. Performance Standards and Section 271 Compliance Are Not Adequate Substitutes for *Computer Inquiry* Safeguards

In its *NPRM*, the Commission seeks comment on whether the imposition of certain performance standards on the BOCs' provision of narrowband services would be sufficient to forgo the imposition of the *Computer Inquiry* safeguards on the BOCs' provision of broadband services.[131] The Commission also seeks comment on whether Section 271 compliance for entry into the long distance market would be an adequate substitute for the *Computer Inquiry*

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128 *Advanced Telecommunications Third Report* at ¶ 133 (citing *Advanced Telecommunications Second Report*, 15 FCC Rcd. at 21004).

129 *Id.*

130 *Frame Relay Order*, 10 FCC Rcd. at 13722.

131 *NPRM* at ¶ 48.

safeguards in the BOCs' provision of broadband services.[132] Neither the imposition of performance standards, nor compliance with the Section 271 requirements is a sufficient substitute for the *Computer Inquiry* safeguards, which are necessary to protect against discrimination by the BOCs in the provision of broadband access services.

The Commission's suggestion that the *Computer Inquiry* requirements may be unnecessary for the BOCs' broadband services if the BOCs are achieving certain performance levels with respect to its narrowband services, starts with the erroneous assumption that there should or could be disparate regulatory treatment for BOCs' narrowband and broadband services. As explained herein,[133] there is no legal, technical or market-related distinction that would warrant the elimination of the *Computer Inquiry* safeguards with respect to the BOCs' provision of wireline broadband Internet access services. However, broadband performance standards could usefully supplement existing Computer *III* safeguards, and the Commission should consider adopting them.

Section 271 requirements also are not an adequate substitute for *Computer Inquiry* safeguards because they do not address the specific concerns underlying the need for the safeguards. They are also only applicable to BOCs that choose to provide long distance service. Moreover, Section 271 does not specifically require the BOCs providing bundled basic and information services to separate the basic transmission services underlying the provision of broadband services and to make this transmission service available to competing broadband

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132 *Id.*

133 *Supra* pp. 31-41.

service providers. Applying the *Computer Inquiry* safeguards to broadband Internet access services, however, would ensure such non-discriminatory access.[134]

Moreover, under Section 271 the BOCs need only meet a minimum level of performance and that performance is assessed on the "totality of the circumstances."[135] Such an assessment provides no guarantee that a BOC has met the required performance level with respect to all competitive carriers seeking access to its network facilities or even with respect to each element on the 14-point checklist. Further, there is no guarantee that a BOC will maintain those performance levels after its Section 271 application is approved. Indeed, Verizon paid $3.5 Million in Performance Assurance Plan penalties for December 2000 and $3.8 Million for January 2001 for failure to meet post-review performance standards.[136] Thus, BOC compliance with the Section 271 requirements is an inadequate substitute for the *Computer Inquiry* safeguards.

F. Intermodal Competition Is Irrelevant to the Need for ILEC Safeguards

In the *NPRM*, the Commission states that the "core assumption underlying the *Computer Inquiries* was that the telephone network is the primary, if not exclusive, means through which ISPs can obtain access to customers."[137] The Commission suggests that the *Computer Inquiry* safeguards may no longer be necessary to protect ISPs from discrimination because there are other network platforms, such as cable, wireless and satellite, over which

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134 *See supra* pp. 44-46.

135 *See In Re Joint Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for the Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* 16 FCC Rcd. 6237, ¶ 29 (2001).

136 *See* Verizon New York PAP/CCAP Market Adjustment summary, December 2000 and January 2001. http://238.11.40.241/east/wholesale/resources/res_ny_perf_assur_plan_results.htm

137 *NPRM* at ¶ 36.

customers can access broadband services.[138] Contrary to the Commission's suggestion, however, intermodal competition, such as it is, does not obviate the need for *Computer Inquiry* safeguards.

While *end-user customers* may have access to a variety of different platforms for receiving broadband services, including cable modem service, *information service providers* do not have ready access to such platforms for the provision of their services to their customers. First, cable companies are regulated under Title VI, not Title II of the Act, and thus are not required to open their underlying transmission facilities to ISPs insofar as they are providing cable service. Indeed, with respect to cable modem services, the Commission recently found that cable modem service does not include an offering of telecommunications services to the public.[139] The Commission also found that the *Computer II* requirements governing the unbundling of transmission facilities do not apply to cable operators providing cable modem services, and even if they did, the Commission waived the requirements on their own motion.[140] Even though a few cable operators are providing transmission services to unaffiliated ISPs by choice[141] or pursuant to a government decree,[142] this access is extremely limited and only available to a few ISPs. Moreover, differences between their respective customer bases render cable modem services, which focuses primarily on residential customers, an inadequate substitute for ISPs targeting business customers.

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138 *Id.*

139 *See In Re Inquiry Concerning High-Speed access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking,* GN Docket No. 00-185, FCC 02-77 at ¶¶ 45-47, 95 (rel. Mar. 15, 2002).

140 *Id.* at ¶¶ 43-45.

141 *See* Comcast Corp, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (press release), Feb. 26, 2002).

142 *See* FTC AOL Time Warner Merger Order, Federal Trade Commission, Docket No. C-3989, File No. 001 0105, §§ II, III (December 14, 2000).

In addition, the other platforms, wireless and satellite, are not only still in their infancy, but -- like cable -- are not regulated as Title II common carriers. Thus, access to these transmission services also is not readily available to ISPs. Thus, as explained herein, the transmission facilities of dominant facilities-based common carriers still are "the primary, if not exclusive, means through which ISPs can obtain access to customers." If *Computer Inquiry* safeguards are not in place, the ILECs will not be required to provide competing ISPs with the transmission capacity needed to provide their services to their customers. And, even if the ILECs were to provide such services, without the safeguards in place, there would be no assurances that such services would be provided on a non-discriminatory basis and under the same terms and conditions that the ILECs obtain to provide their own enhanced services. As a result, competing ISPs would effectively be cut off from providing wireline broadband Internet access services, especially where intermodal competition between delivery platforms has a diminutive ameliorating effect on the ability of ISPs to reach their customers. Accordingly, intermodal competition does not reduce the need for application of Title II safeguards to LECs.

G. *Computer Inquiry* Safeguards Should Be Preserved and Expanded

At a minimum, for the reasons stated above, the Commission should continue to apply the existing *Computer Inquiry* safeguards to the BOCs with respect to their provision of broadband Internet access services.[143] However, as documented in comments filed in the Commission's *Computer III Further Remand FNPRM* , and incorporated by the NPRM into this proceeding, the BOCs have engaged in systematic anti-competitive and discriminatory behavior

[143] *See supra* pp. 41-49.

in the broadband services market despite the existing safeguards.[144] Accordingly, the Commission should strengthen safeguards.

The BOCs have demonstrated that they are able and willing to discriminate and engage in anti-competitive behavior in the provision of broadband access services. It is essential that the Commission maintain, at a minimum, the existing *Computer Inquiry* safeguards, but it also should consider modifying or establishing additional safeguards to protect competitors from such anti-competitive behavior and to ensure that competing ISPs have access to essential bottleneck transmission facilities and services on non-discriminatory terms and conditions.

VI. DEREGULATION WOULD NOT PROMOTE THE AVAILABILITY OF BROADBAND SERVICES

A. ILECs Are Already Deploying a Broadband Capability

ILECs have already widely deployed a broadband capability, and are rapidly installing an even more robust broadband capability in their existing networks. For example, BellSouth announced 25% growth in data revenues and a 189% increase in DSL subscribers in 2001, which BellSouth noted was "the fastest growth of any DSL or cable provider in the country;"[145] it also claimed that it had "the most aggressive DSL deployment strategy in the industry" and that it had increased its DSL coverage from 45% to 70% of households in 2001.[146] In its fourth quarter, year-end 2001 results report, Qwest stated that "DSL, wireless and Internet services continue to

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144 *See* Initial Comments of the California ISP Association, Inc., CC Docket Nos. 95-20 and 98-10 (filed April 16, 2001).

145 BellSouth investor news, "BellSouth Reports Fourth Quarter Earnings," http://www.bellsouth.com/investor/pdf/4q01p_news.pdf (Jan. 22, 2002).

146 Newsroom, "BellSouth Captures 620,500 DSL Customers and Deploys Broadband Capabilities to More than 15.5 Million Lines," http://bellsouthcorp.com/proactive/newsroom/release (Jan. 3, 2002).

be key growth products,"[147] with a 74% increase from the end of 2000,[148] and an increase of 15% over year-end 2000 of the number of its central offices equipped for DSL.[149]

In 1999, SBC launched "Project Pronto," a $5 Billion investment in high-speed broadband services to residential consumers,[150] by January 24, 2002, it was able to report in an "Investor Briefing" that it had expanded its DSL-capable footprint by 37% in 2001 and that it had the "industry's largest DSL Internet customer base."[151] SBC also announced growth in its data services of between 14.4% and 27.9% in 2001 and 16.9% in the fourth quarter of 2001 for high-speed data transport services.[152] In June 2001, Verizon informed the New York Public Service Commission that the "unprecedented and unpredictable demand" for high-speed data circuits required increased capital spending and the deployment of new technologies.[153] It also announced that it had deployed DSL to central offices serving 79% of Verizon's local access lines and that its total number of data circuits in service had increased 53% from 2000.[154]

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147 "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

148 *Id.*

149 "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

150 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33, ¶ 70 (rel. Feb. 6, 2002) ("*Third Section 706 Report*").

151 SBC Investor Briefing No. 228, http://www.sbc.com/investor_relations/financial_and_growth_profile /investor_briefings /1,5869,253,00.html, at 2 and 5 (Jan. 24, 2002) ("SBC Fourth Quarter Briefing").

152 SBC Second Quarter Briefing, at 4; SBC Third Quarter Briefing, at 4; SBC Fourth Quarter Briefing, at 4.

153 *See*, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, Cases 00-C-2051 and 92-C-0665, Opinion No. 01-1, NYPSC, June 15, 2001, p. 10.

154 News Release, "Verizon Communications Second Quarter Earnings Highlighted by Strong Long-Distance and Wireless Sales," http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=59168 (July 31, 2001).

Verizon reported a 122% increase in DSL subscribers and a 21.2% increase in data transport revenues in 2001.[155]

This shows that they are increasing the deployment of a broadband capability notwithstanding Title II and other the regulatory obligations.

Obviously, these ILECs have deployed, and are continuing to deploy, broadband facilities, including fiber in the loop. This deployment is occurring despite the fact that DSL and other broadband services are treated as telecommunications services subject to common carrier regulation[156] and advanced networks are fully subject to Section 251(c)(3) unbundling obligations.[157] The BOCs' actions reveal that the present regulatory requirements have not inhibited their investment in broadband infrastructure and the deployment of broadband services.

B. Factors Other Than Regulation Fully Account for the Pace of Broadband Deployment

Even if broadband were not being deployed quickly enough – which, according to the Commission's *Advanced Services Reports*, is not the case -- factors other than common carrier regulation of broadband services readily provide an explanation. First, there has yet to appear a "killer application" that requires wireline broadband networks more advanced than those already in place. Video programming is widely available from several sources such as broadcast, videocassettes and DVDs, and in any event is not well suited for viewing on the relatively small screens of most computer monitors. Businesses have been able for years to obtain the high-speed services they need from ILECs in the form of DS-1 and higher speed services, and many

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155 "Verizon Communications Reports Solid Results For Fourth Quarter, Provides Outlook for 2002," http://investor.verizon.com/news/VZ/2002-01-31_X263602.html (Jan. 31, 2002).

156 *Deployment of Wireline Service Offering Advanced Telecommunication Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking,* 13 FCC Rcd 24011, ¶ 32 (1998).

157 *Id.* at ¶¶ 46-49.

consumers find 56K dial-up access speeds adequate for their current Internet access needs. The reason even more advanced wireline broadband networks have not been built is because there is insufficient demand for them.

Another reason ubiquitous "super" broadband networks have not been built is because the technical solutions that might make them affordable have not yet been invented. Recent studies show that consumers are unwilling to pay more than $25.00/month for high speed access, thus explaining why less than 5% of U.S. households subscribe to it.[158] The ILECs have put forth visions of a kind of super-broadband "passive optical network" that would bring fiber optics as close to consumers as possible.[159] However, such a network is currently not economically feasible, with the ILECs' own funded studies estimating that the cost of deploying such "super networks" nationwide would be $270 billion to $416 billion.[160]

Accordingly, even if the Commission were to comprehensively deregulate ILECs' participation in the broadband marketplace, there is no reason to believe that this would result in widespread deployment of more advanced broadband networks, simply because the costs of these networks and services are far higher than consumers are willing to pay. In fact, ILECs will not build these networks of the future unless costs drop dramatically or they are permitted to compel all ratepayers to pay for them through cross-subsidies and general rate increases.

In fact, the Commission itself has provided an explanation for the recent slowdown in the pace of increased investment in broadband networks:

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158 "Broadband Success Requires More than Regulatory Clearance, Says Research," CLEC News, February 21, 2002, http://www.c.ec-planet.com/news/02feb2002/18broadband.html

159 Communications Daily, February 26, 2002, at 4-5, describing *Building a Nationwide Broadband Network: Speeding Job Growth*, Telenomic Research, February 25, 2002.

160 *Id.*

> [I]ndustry investment in infrastructure to support high-speed and advanced services has increased dramatically since 1996. Analysts forecasted at that time that this upward trend would continue, spurred by the introduction of competition into the market. Although analysts still generally expect this trend to continue, they observe that there has been a recent slowdown in investment caused by the economic downturn generally and, more particularly, over-building by carriers, over-manufacturing by vendors, over-capitalization by financial markets, coupled with unrealistic market expectations by investors.[161]

Therefore, there is no basis for the Commission to conclude in this proceeding that removal of common carrier regulation from ILEC broadband capability would promote its policy goals of "ubiquitous availability of broadband to all Americans."

C. ILECs Have Strong Incentives Not to Deploy Broadband

Despite their ubiquitous networks, ILECs have never been the best source of innovation in the provision of services. In fact, ILECs are notoriously slow to roll out new services, and have strong incentives not to deploy, new, efficient services that will compete with, and cannibalize, existing services. It has thus far been the competitive providers who have been a key driver in the development and deployment of new advanced services. Competitive providers have pioneered a myriad of advanced services and technologies, such as Internet telephony, unified messaging, and MP3 technology, that promise to revolutionize the telecommunications industry, while ILECs have historically introduced such services only when compelled to in order to catch up to their competitors.

The ILECs in fact ignored DSL technology, which has been around since the 1980's. The introduction and deployment of DSL services by competitive providers forced the ILECs to suddenly begin deploying their own DSL services in order not to be left behind.[162] Or, as stated

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[161] *Third Section 706 Report* at ¶ 62 (footnotes omitted).

[162] *See, e.g.*, ALTS New Economy Analysis at 4 (citing Council of Economic Advisers, Economic Report of the President, February 1999, pp. 187-188, http://w3.access.gpo.gov/usbudget/fy2000/pdf/erp.pdf).

by James Glassman, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher revenue services.[163] That decision is unsurprising and perhaps even economically rational from the ILECs' point of view, but consumers and businesses were required to bear the higher costs and poorer quality of the ILECs' earlier "high speed" services.

As if to confirm their true motivation, after two of the "big three" CLEC DSL providers terminated operations and the third filed for bankruptcy, some ILECs announced they were scaling back DSL investment somewhat – although even this maneuver did not prevent them from achieving the record-breaking growth.[164] In October 2001, SBC scaled back its original deployment plan for Project Pronto and reduced capital spending by 20% in 2002 [165] In short, to the extent any diagnosis other than the general recession is needed to explain these modest scalebacks, it is apparent that ILECs no longer feel the need to invest quite so rapidly in light of the diminished threat of competition from CLECs. It is also worth noting that some ILECs substantially raised prices for DSL service, which never would have happened in a competitive market. For example, SBC raised its wholesale prices for DSL services by approximately 15% in October 2001, while admitting that its cost to provide DSL was declining.[166] SBC therefore perfectly illustrated the monopolist's lack of interest in innovation by reducing investment and raising prices as soon as the threat of broadband competition diminished.

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[163] James Glassman, "Best Remedy for Recession? Break Up the Bells," http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=131 (December 10, 2001).

[164] New York Times, August 6, 2001, at C1 "Bell Companies Blamed for D.S.L.'s Woes."

[165] SBC Advanced Solutions, Inc., Tariff FCC No. 1, pp. 60-69 (eff. Sept. 10, 2001); SBC Second Quarter Briefing, at 5.

[166] SBC Investor Briefing, "Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management," Growth Drivers (July 25, 2001) at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements." http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf (viewed March 1, 2002)).

The Commission has failed to acknowledge in the *NPRM* that it is competition, not deregulation, that best motivates ILECs to invest in broadband, and that it is the availability of unbundled access to incumbent networks on a common carrier basis that permits the provision of services that can compete with ILECs. Accordingly, the Commission should conclude that requiring ILECs to provide broadband facilities to competitors as part of their Title II obligations will help achieve the competition that can best encourage ILECs to build broadband networks.

VII. CONCLUSION

For the reasons stated herein, the Commission should conclude this proceeding finding that:

1. facilities-based wireline broadband Internet access service is a bundled offering of a telecommunications service (subject to Title II) and an information service;
2. ILEC broadband capabilities are subject to Title II;
3. wireline facilities used by a CLEC to provide telecommunications service is a network element subject to the Commission's unbundling rules, regardless of the use the ILEC makes of the network element;
4. the Commission's *Computer III* rules are affirmed and that, under these rules, ILECs may use their own DSL services to offer high speed Internet access services, but, pursuant to Title II, are required to make DSL services available to other ISPs on a nondiscriminatory basis; and

5. if, despite the record before it, the Commission determines any deregulation of broadband facilities or services is necessary, it should be accomplished through forebearance from the relevant provision of Title II.

Respectfully submitted,

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